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IN THE

Supreme Court of the United States

October Term, A. D. 1941.

No. 840

CHARLES M. THOMSON, Trustee of the Chicago and North Western Railway Company, a corporation,

Petitioner,

vs.

WILLIAM F. BOLES,

Respondent.

PETITION FOR WRIT OF CERTIORARI. AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, A. D. 1941.

No. .....

CHARLES M. THOMSON, Trustee of the Chicago and North Western Railway Company, a corporation,

Petitioner,

vs.

WILLIAM F. BOLES,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Charles M. Thomson, Trustee of the property of the Chicago and North Western Railway Company, respectfully shows to this Honorable Court:

*SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action originally brought in the District Court of the United States for the District of Minnesota, Third Division, by respondent against petitioner, for damages for personal injuries sustained by respondent while in the employ of the petitioner as a brakeman. The petitioner is the

*Figures in parenthesis refer to pages of printed record.

Trustee of the property of the Chicago and North Western Railway Company, a railroad corporation.

Jurisdiction of the Federal District Court was properly grounded on allegations and proof that petitioner and respondent were engaged in interstate commerce at the time of the accident (R. 9). This brought the case within the jurisdictional requirements of the Federal Employers' Liability Act (U. S. C. A. Title 45, Sec. 51-59, incl., Act of April 22, 1908, Chapter 149, Sec. 1-9, 35 Stat. 65, 66; amended act April 5, 1910, Chapter 143, Sec. 1-2, 36 Stat. 291).

Trial was had before Honorable Robert C. Bell and a jury. There was a verdict for respondent in the sum of $21,500 (R. 383).

Petitioner's motions for judgment in petitioner's favor notwithstanding the verdict (R. 394-96), and for a new trial (R. 387-92) were denied (R. 394-96). Petitioner appealed from the judgment to the Circuit Court of Appeals, Eighth Circuit, (R. 383-84) where the judgment was affirmed. The mandate was stayed pending the filing of this petition (R. 437).

FACTS.

Near Kickapoo Junction, Illinois, petitioner's single track railroad running north and south (R. 154) crosses on a bridge spanning Kickapoo Creek. The northerly portion of this bridge was of wood construction (R. 154) and along the easterly side thereof was a wood guard-rail (Defendant's Exhibit 11, R. 197). Immediately west of the so-called guard-rail there was a planked walkway 2 feet 10 inches in width (R. 159). The guard-rail at the top leaned easterly 8 inches over the bottom portion (R. 240). The purpose of

this railing according to respondent was "for the protection when you walk across there" (R. 70). Prior to the accident petitioner had decided to rebuild the wooden section of the bridge, including taking out the entire guard-rail and putting in an all-new one (R. 241-42). To prepare for the contemplated work petitioner had removed a portion of the guard-rail and substituted six so-called temporary gates in the railing, which were made of new lumber (R. 231). Also petitioner had moved some of the stringers to which the uprights of the guard-rail were bolted, and had spliced some of the guard-rails. The gates and changes were necessary so that the stringers would not interfere with the contemplated work, and that the gate openings in the guard-rail might accommodate the hammer on the pile-driver when piles under the walkway were being driven (R. 237). On June 12, 1940, petitioner began driving piles in this bridge (R. 260). In this work was used a train consisting of a locomotive, a caboose, flat car, and pile driver. Respondent was a brakeman on this train. It was his duty to flag the train on to the bridge. He did this while walking along the walkway (R. 262). After one pile had been placed, he for a second time, flagged the train on to the bridge, using the walkway (R. 292). After this second movement the actual driving of the piles was begun. While the driving of the piles was in progress, respondent, for his own convenience, went to the guard-rail (R. 110), and, according to his own signed statement, sat on the rail (R. 115). At the trial, respondent testified that he did not sit on the guard-rail, but leaned against it (R. 113). While respondent was sitting on or leaning against the guard-rail Hannum, the conductor of the work train, approached him and placed his hand against the guard-rail. Almost immediately respond-

ent and Hannum fell from the bridge to the ground below, a distance of 22 feet (R. 81). After the accident the top piece of a portion of the old guard-rail was missing and the broken pieces were found on the ground below. There were only two witnesses who testified to the exact place where respondent sat on the railing. They were Peatschman, the engineer of the pile-driver, (R. 270) and Livingstone, the fireman on the locomotive (R. 294). Both state that respondent was sitting on one of the temporary gates in the railing. Respondent did not know whether he sat on a so-called gate or not (R. 133). Respondent denied that he told the claim agent of petitioner that prior to the accident he was sitting on the railing, but admitted signing a statement to that effect.

So far as material here, the points relied upon for reversal in the Circuit Court of Appeals were (1) errors in rulings on the reception and rejection of evidence; (2) prejudicial, inflammatory and unwarranted statements by plaintiff's counsel in his closing argument; (3) and errors in the court's charge and in refusing to instruct the jury as the defendant requested. The Circuit Court of Appeals in its decision decided each of these points adversely to the petitioner. That duly certified record, including all proceedings in said cause in said United States District Court of Minnesota, Third Division, and in said United States Circuit Court of Appeals for the Eighth Circuit is filed herewith, under separate cover.

JURISDICTION OF THE COURT.

The jurisdiction of this court is based upon Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c-229, Sec. 1, 43 Stat. 398, Title 28, U. S. C. A. Sec. 347, providing for review by this court by certiorari of decisions of the Circuit Court of Appeals. The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on November 25, 1941 and mandate stayed until January 9, 1942. The date of the filing of this application for certiorari is shown by the clerk's stamp on the cover hereof.

Cases believed to sustain jurisdiction are:

Forsyth v. Hammond, 166 U. S. 506;

Gay v. Ruff, 292 U. S. 25

Penn. R. Co. v. Chamberlain, 288 U. S. 333.

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) Whether, in an action under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51, Act of April 22, 1908, c-149, Sec. 1, 35 Stat. 65) for damages for personal injuries to an employe where the negligence is based upon the failure of the employer to use reasonable care to furnish the employes with a reasonably safe place in which to work, it was reversible error for the trial court to refuse to give the following requested instruction:

> "You are instructed that an employer does not owe the employe a safe place in which to work. All the employer is required to do is to use reasonable care to fur-

nish his employe a reasonably safe place in which to work and that when the employer has used such reasonable care to furnish his employe a reasonably safe place in which to work, he has discharged his full duty toward his employe in that regard" (R. 370-71).

(2) Whether, in an action under the Federal Employers' Liability Act, where the claimed negligence is based on the employer's failure to use ordinary care to furnish the employee with a reasonably safe place to work, it is reversible error for the trial court to charge the jury that the employer owed the absolute duty to furnish the employee with a safe place to work.

(3) Whether, in an action under the Federal Employers' Liability Act to recover damages for personal injuries to an employe, it is reversible error to permit plaintiff's counsel, over the objection of the defendant, to show that the injured employe is married and has a family (R. 59-60), and thereafter in his closing argument, to refer to that fact (R. 352).

(4) Whether, in an action under the Federal Employers' Liability Act to recover damages for personal injuries to an employe, a verdict in favor of the plaintiff can be sustained, when counsel for the plaintiff in his closing argument has made highly inflammatory statements and an unjustified and bitter and passionate attack on the defendant, his witnesses and counsel, tending to stir up resentment and arouse passion and prejudice of the jury.

(5) Whether, in an action under the Federal Employers' Liability Act to recover damages for personal injuries to an employe, it is the duty of the court on its own motion to protect a suitor in his right to a verdict uninfluenced by appeals of counsel to passion and prejudice, and whether it is reversible error not to do so.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) In this case, the United States Circuit Court of Appeals for the Eighth Circuit, by its opinion herein, rendered on November 25, 1941, decided an important question of Federal law, in conflict with applicable decisions of the Supreme Court of the United States; namely, in that it held that under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51, Act of April 22, 1908, c-149, Sec. 1, 35 Stat. 65) for injuries to an employe where the issue is whether the employer has used reasonable care to furnish the employe with a reasonably safe place in which to work, the employer was not entitled to the following requested instruction:

> "You are instructed that an employer does not owe the employe a safe place in which to work. All the employer is required to do is to use reasonable care to furnish his employe a reasonably safe place in which to work and that when the employer has used such reasonable care to furnish his employe a reasonably safe place in which to work, he has discharged his full duty toward his employe in that regard."

(2) In this case the circuit court of appeals decided an important question of Federal law in conflict with an applicable decision of this court in holding that it was not prejudicial error to permit the plaintiff to show that he was married and had a family.

Penn v. Roy, 102 U. S. 451, 26 L. Ed. 141;

Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062;

Yazoo & M. R. R. Co. v. Mullins, 249 U. S. 531, 533; 39 S. C. R. 368, 63 L. Ed. 754;

B. & O. R. Co. v. Carroll, 280 U. S. 491, 496; 50 S. C. R. 182, 74 L. Ed. 566;

D. L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. C. R. 202, 73 L. Ed. 578.

(3) In this case, the United States Circuit Court of Appeals for the Eighth Circuit, by its opinion herein, rendered on November 25, 1941, decided an important question of Federal law in conflict with applicable decisions of this court in holding that a verdict should not be disturbed by reason of misconduct on the part of plaintiff's counsel in making unjustified and highly inflammatory statements and a bitter and passionate attack on the defendant, his witnesses and counsel, tending to stir up resentment and arousing passion and prejudice of the jury in the absence of a strict compliance with the following admonition of that court in an earlier decision:

> "In the future, to secure from this court as a matter of right, a reversal of a judgment because of improper remarks of counsel, in an argument made to a jury, the bill of exceptions must contain all arguments in full and must show, either that adequate objections and exceptions to rulings thereon were taken during the argument complained of, or that such remarks were specifically excepted to at the close of the argument."

N. Y. C. R. Co. v. Johnson, 279 U. S. 310, 49 S. C. R. 301;

M. St. P. & S. S. M. R. Co. v. Moquin, 283 U. S. 520, 51 S. C. R. 501.

(4) In this case, the United States Circuit Court of Appeals of the Eighth Circuit, in matters of importance, departed from the accepted and usual course of judicial pro-

ceedings so as to call for an exercise of supervision by the Supreme Court of the United States.

(5) In this case, the decision of the Circuit Court of Appeals announced principles and rules which are contrary to the decisions of the Supreme Court of the United States, and at variance with decisions of other Circuit Courts of Appeal.

PRAYER.

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit to the end that the judgment of said Court of Appeals in said cause of Charles M. Thomson, Trustee of the Chicago and North Western Railway Company, a corporation, Appellant, v. William F. Boles, Appellee, No. 11,997, be reviewed by this Court, as provided by law, and that upon such review the judgment of said Court of Appeals in said cause, of date November 25, 1941, be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

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